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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

CHASOM BROWN, WILLIAM BYATT,  
JEREMY DAVIS, CHRISTOPHER  
CASTILLO, and MONIQUE TRUJILLO,  
individually and on behalf of all similarly  
situated,

Plaintiffs,

v.

GOOGLE LLC,  
Defendant.

Case No. 5:20-cv-03664-LHK-SVK

**DEFENDANT GOOGLE LLC'S  
ADMINISTRATIVE MOTION TO SEAL  
THE COURTROOM FOR HEARING ON  
JOINT DISCOVERY STATEMENT (DKT.  
140)**

Referral: Hon. Susan van Keulen, USMJ  
Hearing Date: April 29, 2021  
Hearing Time: 1:30 P.M.

## I. INTRODUCTION

On April 29, 2021, this Court will hear the issues raised in the parties' Joint Discovery Statement (Dkt. 140). The Court previously ordered the parties to submit a Joint Discovery Statement by April 7, 2021 and to appear for a joint discovery status hearing on April 13, 2021 (Dkt. 125), to which the parties complied. Subsequent to the April 13, 2021 hearing, the Court ordered the parties to: continue to meet and confer; submit another Joint Discovery Statement by April 23, 2021 reflecting the status of the parties' discovery disputes; and, appear at a further discovery hearing on April 29, 2021 (Dkt. 133). The parties' Joint Discovery Statement (Dkt. 140) contains Google's confidential and proprietary information regarding highly sensitive features of Google's internal systems and operations that Google does not share publicly and will be discussed at the April 29, 2021 hearing, including (1) Google's retention of certain logs at issue, and (2) the various types of unauthenticated identifiers/cookies Google uses internally and their corresponding proprietary functions. The Court previously sealed the hearing related to the former category in *Calhoun v. Google LLC*, No. 5:20-cv-05146-LHK-SVK, Dkt. 124 (N.D. Cal. Mar. 3, 2021) pursuant to Google's request and Google has moved to seal the information in the latter category (Dkt. 139), which is still pending.

In light of the highly confidential material to be discussed at the April 29, 2021 hearing, Google asked Plaintiffs to stipulate to sealing the hearing pursuant to Civil Local Rules 7-11 and 79-5 and Federal Rule of Civil Procedure 26(c). Tse Decl., ¶ 3. Plaintiffs stated they do not oppose Google's request. *Id.* Therefore, Google now moves the Court to seal the courtroom for the April 29, 2021 hearing on the Joint Discovery Statement (Dkt. 140).

## II. LEGAL STANDARD

While there is a common law right of public access to judicial proceedings, that right is not a constitutional right and it is "not absolute." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978); *Crowe v. Cty. of San Diego*, 210 F. Supp. 2d 1189, 1194 (S.D. Cal. 2002) ("[T]here is no right of access which attaches to all judicial proceedings." (internal citations omitted)). The right is weakest where, as here, the proceedings concern a non-dispositive discovery motion; rather than satisfy the more stringent "compelling reasons" standard, a party seeking to seal materials in these

1 circumstances must make only a “particularized showing” of “good cause.” *Kamakana v. City &*  
 2 *County of Honolulu*, 447 F.3d 1172, 1178–80 (9th Cir. 2006). Such sealing at trial is appropriate  
 3 when the information at issue constitutes “competitively sensitive information,” such as  
 4 “confidential research, development, or commercial information.” *France Telecom S.A. v. Marvell*  
 5 *Semiconductor Inc.*, 2014 WL 4965995, at \*4 (N.D. Cal. Oct. 3, 2014); *see also Phillips v. Gen.*  
 6 *Motors Corp.*, 307 F.3d 1206, 1211 (9th Cir. 2002) (acknowledging courts’ “broad latitude” to  
 7 “prevent disclosure of materials for many types of information, including, but not limited to, trade  
 8 secrets or other confidential research, development, or commercial information”); *Standard &*  
 9 *Poor’s Corp. Inc. v. Commodity Exch., Inc.*, 541 F. Supp. 1273, 1275 (S.D.N.Y. 1982) (“[T]he  
 10 overriding interest to be found in business confidences . . . require[s] . . . temporary reasonably  
 11 restricted access to the Courtroom of members of the public.”).

### 12 **III. THE HEARING SHOULD BE SEALED BECAUSE PARTIES’ ARGUMENTS WILL** 13 **NECESSARILY INVOLVE DISCLOSURE OF GOOGLE’S HIGHLY SENSITIVE** 14 **MATERIAL**

15 All facts militate in favor of sealing the April 29, 2021 hearing. The “good cause” standard  
 16 that governs the sealing determination in non-dispositive motions is easily met. The parties’ Joint  
 17 Discovery Statement contains detailed discussions on Google’s confidential information, including  
 18 the highly sensitive features of Google’s systems and operations. *See* Dkts. 139, 140. As explained  
 19 in Google’s pending Administrative Motion to Seal Joint Discovery Statement, the information  
 20 sought to be sealed in this briefing reveals Google’s internal strategies, system designs, and business  
 21 practices for operating and maintaining many of its important services while complying with its  
 22 legal and privacy obligations. Dkt. 139 at 3. Such information is protectable and must be kept  
 23 confidential in order to prevent harm to Google’s competitive standing. *Id.* at 3. Moreover, public  
 24 disclosure of Google’s confidential information may put Google at an increased risk of cybersecurity  
 25 threats. *Id.* at 3-4.

26 First, the Joint Discovery Statement identifies the parties’ “dispute regarding preservation  
 27 and production of Google server logs regarding Google’s collection and use of private browsing  
 28 information.” Dkt. 139-4 at 7 (Dispute P4). To show that the burden Plaintiffs seek to impose for  
 preserving the logs at issue is immense at the April 29, 2021 hearing, Google will need to rely on

1 confidential information regarding highly sensitive features of Google’s operations. Specifically,  
2 this information provides details related to the various types of data logs maintained by Google,  
3 information contained in those logs, the size of those logs, the logs’ retention policies, and the cost  
4 in money and man-hours for suspending retention periods for those logs. Such information reveals  
5 Google’s internal strategies, proprietary system designs, business practices, and system capacities  
6 for operating and maintaining many of its important services while complying with its legal and  
7 privacy obligations. This Court has previously granted Google’s motion to seal the courtroom on  
8 this precise issue in *Calhoun*, Dkt. 124. Since then, Google has produced in this case many  
9 additional confidential documents and the deposition transcript related to this issue from *Calhoun*.  
10 See Dkt. 133-1 at 3-4. As a result, there is now even more confidential information related to  
11 Google’s retention and production of the relevant logs that may be referenced at the April 29, 2021  
12 hearing, which Google must also be able to address freely. If the hearing is not sealed, Google would  
13 have to pick between two evils: revealing its highly confidential information that may harm Google  
14 and put it at a competitive disadvantage, or vigorously arguing—without supporting facts—that  
15 Plaintiffs’ blunderbuss preservation demand is burdensome and disproportional.

16 Second, both parties also rely on Google’s confidential information regarding highly  
17 sensitive features of Google’s internal systems and operations for their positions in the Joint  
18 Statement Regarding Class Member Identification (Chart A # P6). Specifically, this information  
19 provides details related to, among other things, whether Google maintains any system or process for  
20 identifying logged-out users while they are in private browsing mode for purposes of identifying  
21 putative class members, and thus, whether Google can produce certain documents in response to  
22 Plaintiffs’ RFP No. 10, which will necessarily require discussion of the various types of Google’s  
23 internal identifiers/cookies and their proprietary functions. Dkt. 139 at 3; *see also* Dkt. 139-4. Such  
24 information reveals Google’s internal strategies, system designs, and business practices for  
25 operating and maintaining many of its important services while complying with its legal and privacy  
26 obligations. Indeed, in their portion of the Joint Statement Regarding Class Member Identification  
27 and in the Chart of Disputes Regarding Plaintiffs’ Written Discovery (Chart B), Plaintiffs repeatedly  
28 refer to protected materials Google produced and discuss what they learned from those confidential

1 materials, including Google's unauthenticated identifiers/cookies and their proprietary functions. *See*  
 2 Dkt. 139-4 at 4, 15-23 (Chart B). Google must be able to freely refer to this information to fully  
 3 explain to the Court how, contrary to Plaintiffs' fanciful tales, its internal identifiers/cookies work  
 4 in the real world—without fear of public disclosure of sensitive Google business information. It  
 5 would be unfair and prejudicial to force Google's counsel to choose between providing facts to the  
 6 Court by relying on this confidential information and retaining the confidentiality of these highly  
 7 sensitive facts.

8         Given the importance and highly sensitive nature of the aforementioned information related  
 9 to the parties' discovery disputes, Google believes that sealing the courtroom is the correct and most  
 10 effective approach. Indeed, this Court has recently sealed the hearing where the issue of Google's  
 11 undue burden for preserving the logs at issue was discussed in *Calhoun*, Dkt. 124. The virtual  
 12 proceedings in this case permit the attendance of hundreds of interested members of the public,  
 13 including legal experts and journalists, and allowing confidential material to be discussed in open  
 14 court in these circumstances is tantamount to having it filed publicly on the docket. Google proposes  
 15 that the Court seal the April 29, 2021 hearing and that Google will file a motion to seal the April 29,  
 16 2021 transcript after the hearing to redact any confidential information.

17         Google defers to the Court as to the best method for sealing the April 29, 2021 hearing in  
 18 light of the virtual proceedings but proposes that the Court may consider directing the parties to dial  
 19 into a private Zoom meeting, instead of a Zoom webinar.

#### 20 **IV. CONCLUSION**

21         For the foregoing reasons, Google respectfully requests that the Court seal the April 29, 2021  
 22 hearing on the parties' Joint Discovery Statement (Dkt. 140).

23 DATED: April 27, 2021

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